STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE M. CARRELL,

Plaintiff/Counterdefendant-Appellee,

v

NEAL S. CARRELL,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
December 9, 2003

No. 238103
Wayne Circuit Court
LC No. 98-812823-DO

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Defendant/counterplaintiff Neal Carrell appeals as of right from the trial court's November 2, 2001 opinion and order granting plaintiff/counterdefendant's Jeanette Carrell's motion for relief from judgment. We affirm.

In this case we are asked to determine whether the trial court properly granted plaintiff relief from judgment under MCR 2.612(C)(1)(f), vacating the portion of the parties' settlement agreement regarding their pensions. To address this issue we must review the record to find out if the trial court properly determined that extraordinary factors existed to warrant such action. Because the evidence revealed a large disparity between the parties' pensions and the parties had expressed a desire to reach an equitable settlement, we find no abuse of discretion. We also find that case law does not support defendant's argument that the coverture fraction must be used to determine the premarital portion of a pension.

Plaintiff filed for divorce on April 22, 1998, after nearly ten years of marriage to defendant. On July 20, 1998, the parties reached a settlement agreement disposing of marital property and placed the agreement on the record. Under the agreement, each party received his and her own pension. When the settlement was reached, however, neither party had conducted discovery to determine the precise value of the pensions. It is undisputed that defendant claimed he did not know the overall value of his pension at the time of the settlement conference. Plaintiff subsequently testified that defendant led her to believe his pension was worth approximately $15,000.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

After reaching the negotiated settlement, plaintiff soon discovered that the value of defendant's pension was much higher, and refused to sign the divorce judgment. On February 11, 1999, defendant brought a motion before the trial court to enter the divorce judgment that was placed on the record. The trial court granted defendant's motion on May 14, 1999. Less than a month later, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(a) and (C)(1)(c). The trial court ultimately granted plaintiff's motion under MCR 2.612(C)(1)(f) and modified the divorce judgment so each party would receive fifty percent of the marital portion of the other's pension upon their retirement.

On appeal, defendant contests the trial court's finding that extraordinary circumstances existed in this case to warrant the setting aside of the pension provision in the parties' negotiated property settlement. A trial court's factual findings are reviewed for clear error on appeal.[1] But "[a] trial court's decision on a motion to set aside a prior judgment is discretionary and will not be reversed on appeal absent an abuse of discretion."[2] A finding is clearly erroneous if, after a review of the record, this Court is firmly convinced that a mistake has been made.[3]

A trial court may grant relief from a final judgment under MCR 2.612(C)(1) on the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

In *Heugel v Heugel*, we held that a trial court could set aside a parties' property settlement agreement under MCR 2.612(C)(1)(f) if the facts established "extraordinary circumstances."[4] We further reasserted the discretion afforded a trial court's decision to grant relief from judgment under that rule:

> The exact parameters of this rule have never been delineated. Nor can they be. The trial courts must be empowered to draw from their long experience, both with the particular case and from the bench, to determine whether any variables in the case warrant this extraordinary relief. We eschew any standard which would force [a] trial court[] to engage in frustrating semantic exercises to

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[1] *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992).

[2] *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

[3] *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000).

[4] *Heugel, supra.*

> bring [its] particular case, which is crying for relief, within the purview of an inflexibly phrased rule.[5]

Heugel goes on to indicate that the following requirements must be satisfied for relief under subsection (f): (1) the rationale for setting aside the judgment must not fall under the subsections (a) through (e); (2) the opposing party's substantial rights must not be detrimentally affected; and (3) there must be extraordinary circumstances that warrant setting aside the judgment to achieve justice.[6]

In reaching its decision, the trial court in this case relied upon the great disparity between plaintiff's perceived value of defendant's pension and its actual value. It further took into account the parties' testimony that they intended an equitable disposition of the marital property. The trial court also questioned defendant's alleged ignorance of the value of his pension, given his position as the pension representative for his union and his awareness of the monthly benefits received by other retirees. There was further evidence presented that plaintiff's original counsel was suspended from the practice of law in the year 2000, approximately two years after the settlement conference. Plaintiff's original counsel also testified that she lost plaintiff's case file sometime between the settlement conference and the entry of the judgment of divorce. On these facts, we do not find that the trial court abused its discretion in granting plaintiff's motion.

We also disagree with defendant's argument that the trial court clearly erred in the valuation of his pension. The record reveals that both parties presented expert witness testimony on the value of defendant's pension. Defendant's expert valued defendant's pension by using defendant's stated retirement age of fifty-seven and by applying the coverture fraction to equalize the marital and premarital portions. Conversely, plaintiff's expert relied upon defendant's earliest possible retirement age, fifty-two, and the benefit information provided from defendant's employer. He explained that when the employer submits a figure representing an employee-party's premarital pension value, use of the coverture fraction is unnecessary. In its judgment, the trial court reduced the value of defendant's pension by $37,665.68, based on information defendant's employer supplied listing this figure as the value of defendant's pension at the time he married plaintiff. The trial court then entered a QDRO[7] that entitled plaintiff to fifty percent of the remainder of defendant's pension upon defendant's retirement.

Contrary to defendant's assertion on appeal, the trial court was not required to use the coverture fraction in valuing defendant's pension. While the coverture fraction has been endorsed as an appropriate means of determining the premarital value of a party's pension,[8] this Court has never held that the trial court *must* use this method. Rather, this Court has consistently stated that the trial court is in the best position to decide which method to use in determining the premarital value of a party's pension.[9] It is more important for a "trial court, when valuing a

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[5] *Id*. at 480, quoting *Kaleal v Kaleal*, 73 Mich App 181, 189; 250 NW2d 799 (1977).

[6] *Heugel*, *supra* at 478-479.

[7] Qualified Domestic Relations Order.

[8] See *Vander Veen v Vander Veen*, 229 Mich App 108, 113, 115; 580 NW2d 924 (1998).

[9] *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993).

pension, . . . to reach a fair and equitable division of the property in light of all the circumstances."[10] Further, because the trial court entered a QDRO it was not required to speculate on defendant's retirement age. Accordingly, defendant has failed to establish clear error in this regard.

Defendant further contends that the trial court erred in awarding the parties' rights of survivorship concerning their pensions because such provisions were not considered in the parties' negotiated settlement. To support his argument, defendant relies on *Quade v Quade* where this Court determined that the trial court properly refused to award the plaintiff a share of the defendant's early retirement benefits in the QDRO when they were not specifically awarded in the judgment of divorce.[11] Here, however, the trial court could properly award survivorship rights because the portion of the judgment of divorce dealing with the parties' pensions was vacated due to extraordinary circumstances.[12]

To the extent defendant argues that the survivorship instructions were inconsistent, we also disagree. Specifically, defendant claims that the following two provisions of the QDRO are inconsistent:

> 1. the alternate payee shall be treated as the surviving spouse with respect to all pre-retirement and post-retirement surviving spouse benefits;
>
> 2. the alternate payee shall be entitled to a survivor annuity that is equal in dollar amount to the pension benefit amount assigned to the alternate payee. There should be no increase or decrease to the alternate payee's benefit amount upon the death of the participant. . . .

He maintains that under these provisions the payment plaintiff receives would increase upon defendant's death. The QDRO, however, clearly provides that plaintiff will receive fifty percent of the marital portion of defendant's pension, and that she would continue to receive this same amount in the event that defendant predeceases plaintiff. Therefore, defendant has not shown that the trial court clearly erred in this regard.

Defendant's ultimate contention that the trial court abused its discretion by granting partial relief without revisiting the remainder of the divorce judgment is likewise without merit. In *Kaleal v Kaleal,* this Court held that the predecessor to MCR 2.612, GCR 1963, 528.3, allowed the trial court to grant partial relief from judgment.[13] In support of its holding, this Court stated:

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[10] *Id.*

[11] *Quade v Quade*, 238 Mich App 222, 224-225; 604 NW2d 778 (1999).

[12] See *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993) (holding that a trial court must make findings of fact and dispositional rulings when deciding a divorce action).

[13] *Kaleal, supra* at 191.

> The literal language of the rule supports our conclusion. The rule reads in part that relief can be granted "upon such terms that are just." It is therefore readily apparent that this rule did envision flexibility in the power of the court to modify judgments, thereby allowing courts to further the aims of substantial justice. . . . [B]y holding only total relief can be granted, we would neutralize the entire purpose for which the provision was granted.[14]

Because the trial court acted within its discretion in finding that extraordinary circumstances existed, the trial court did not err in granting partial relief.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper

[14] *Id.*, quoting GCR 1963, 528.3.